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No. 06-1603

Supreme Court, U.S.
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In The
Supreme Court of the United States

ROSALINE KENNEDY,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether the 180-day time period to file a motion to reopen *in absentia* removal proceedings based on exceptional circumstances, set out in section 240(b)(5)(C)(i) of the Immigration and Nationality Act (hereinafter "INA"), codified at 8 U.S.C. § 1229a(b)(5)(C)(i), is equitably tolled where the alien demonstrates that ineffective assistance of counsel prevented her from discovering the *in absentia* removal order until after the 180 days had expired.

2. Whether the 180-day time period to file a motion to reopen *in absentia* removal proceedings, set out in INA § 240(b)(5)(C)(i), 8 U.S.C. § 1229a(b)(5)(C)(i), is jurisdictional.

3. Whether the Eleventh Circuit should have adopted an equitable tolling doctrine based on ineffective assistance of counsel where eight other Circuits have adopted such a rule.

PARTIES TO PROCEEDING

The Petitioner is Rosaline Kennedy. The Respondent is Alberto Gonzales, the Attorney General of the United States.

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PETITION FOR WRIT OF CERTIORARI

Rosaline Kennedy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. (App. 1a). The opinion of the Board of Immigration Appeals affirming the final order of removal is unreported. (App. 6a). The opinion of the Immigration Judge denying relief from removal is unreported. (App. 10a).

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Section 240 of the Immigration and Nationality Act, codified at section 1229a of Title 8 of the United States Code provides:

(b) Conduct of proceeding

(5) Consequences of failure to appear

(A)In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the attorney general shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

* * *

(C) Rescission of order

Such an order may be rescinded only –

(1) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section.

* * *

(e) Definitions
In this section and section 1229b of this title:

(1) Exceptional circumstances
The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable
The term removable means –

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

STATEMENT

This case involves the issue of whether the 180-day time limit for filing a motion to reopen *in absentia* removal proceedings, pursuant to INA § 240(b)(5)(C)(i), 8 U.S.C. § 1229a(b)(5)(C)(i), is equitably tolled where the alien demonstrates that ineffective assistance of counsel prevented her from learning that an *in absentia* removal order had been entered until long after the 180 days had expired. The Eleventh Circuit refused to adopt such a rule in

this case, holding that the 180-day time limit is jurisdictional. The First, Second, Third, Fourth, Sixth, Seventh, Ninth, and Tenth circuits have held the opposite. Hence, to resolve this split in the Circuits, this Honorable Court should grant a writ of *certiorari* in this case.

Petitioner, a native and citizen of Brazil, came to this country in 1996 as a visitor authorized to remain for six months. Petitioner overstayed that visa and in 2002, married a U.S. citizen, who filed an I-130 petition for alien relative n her behalf with the legacy Immigration and Naturalization Services, now U.S. Citizenship and Immigration Services (hereinafter "CIS"). The marriage did not last, and Petitioner's husband withdrew the petition in May 2003. After Petitioner's first marriage was annulled in June 2003, she started a relationship with Buck Williams, a U.S. citizen, and eventually moved in with Williams. She had her mailing address changed to a Post Office box, to which mail was being forwarded from her old address. She did not inform CIS of her new address because she had no applications pending before CIS at that time.

In May 2003, Petitioner and Williams met with Kenneth Hatcher, an immigration attorney, and paid him a retainer of $1065 in anticipation of getting married and filing for adjustment of status for Petitioner. In December 2003, Petitioner received a copy of a Notice to Appear (hereinafter "NTA") from Immigration and Customs Enforcement (hereinafter "ICE"), which had been forwarded to the P.O. box from her earlier address. ICE and CIS are both divisions of the Department of Homeland

Security (hereinafter "DHS"). The NTA charged Petitioner with removability based on the overstay of her visitor visa. It requested her appearance at a date to be determined, indicating that she would receive notice at the address she had provided when the hearing was calendared. The NTA included a warning that she was required to inform DHS of any changes of address and that failure to appear at the hearing would result in her being ordered removed *in absentia*.

In January 2004, Petitioner met with Hatcher to seek his advice about the NTA. Hatcher told Petitioner to wait to receive her notice of the hearing date, which could take 12 to 18 months. He did not tell her that she needed to file a change of address with DHS. He did not call the Immigration Court information line to find out if Petitioner already had a hearing scheduled.

On February 12, 2004, Petitioner married Williams. Hatcher filed the adjustment applications on their behalf. They received an interview notice for July 12, 2005, in Charlotte, North Carolina. They met with Hatcher to prepare for the interview, and told him they were concerned that they had never received a hearing notice. At this point, Hatcher finally called the Immigration Court information system and learned that Petitioner had been ordered removed *in absentia* on March 16, 2004.

On July 12, 2005, Hatcher filed a motion to reopen *in absentia* removal proceedings on Petitioner's behalf. Hatcher argued that the

proceedings should be reopened because Petitioner had not received actual notice of the hearing date. The IJ denied this motion, finding that Petitioner was chargeable with notice because she had failed to keep DHS informed of her current address.

Petitioner then retained new counsel and filed a second motion to reopen on August 31, 2005, this time alleging that her failure to appear at her hearing was due to exceptional circumstances, in that she had received ineffective assistance of counsel. In compliance with Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), Petitioner included her affidavit explaining counsel's ineffective actions and an affidavit of Hatcher.

On September 22, 2005, the IJ denied the second motion to reopen, finding that Petitioner had failed to comply with the requirements of Matter of Lozada, and reiterating that the NTA provided Petitioner with notice of her requirement to keep the Immigration Court informed of her address. Petitioner then filed a motion to reconsider, pointing out that, although she had not filed a bar complaint against Hatcher, she had complied with Matter of Lozada by explaining her reason for not filing a bar complaint. Moreover, in an abundance of caution, Petitioner filed a bar complaint after the IJ's decision and submitted a copy of that complaint with her motion to reconsider. The IJ denied the motion to reconsider, finding that, although the Ninth Circuit has announced a doctrine of equitable tolling that might have applied to Petitioner's ineffective assistance claim, the Eleventh Circuit has no such doctrine.

Petitioner appealed the IJ's denial of the motion to reopen to the BIA, arguing, *inter alia*, that the BIA should adopt the doctrine of equitable tolling as applies to her ineffective assistance claim. The BIA denied the appeal on other grounds, declining to consider Petitioner's exceptional circumstances claim because not one of her three motions was filed within the 180-day time period, which the BIA held to be jurisdictional.

Petitioner petitioned for review of the BIA's decision with the Eleventh Circuit Court of Appeals. The Eleventh Circuit denied the petition, holding that, under its precedent set out in Anin v. Reno, 188 F.3d 1273, 1278 (11th Cir. 1999), 180 day time limit for filing a motion to reopen was "jurisdictional and mandatory." Kennedy v. U.S. Attorney General, No. 06-14750, manu. op at 3-4 (11th Cir. April 4, 2007). Hence, the Eleventh Circuit held that it did not recognize equitable tolling based upon alleged ineffectiveness of counsel. Id. at 4.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's refusal to adopt an equitable tolling doctrine in this circumstance creates a true split in the Circuits, as eight other Circuits have adopted such a doctrine. Moreover, the Eleventh Circuit's failure to adopt the doctrine leaves Petitioner in a situation where she is made to suffer the severe hardship of removal from the United States in spite of, and in fact because of, the deficient performance of her attorney. This deprivation of Petitioner's liberty was so

fundamentally unfair as to deny Petitioner her due process rights and prejudice the outcome of her case.

1. The Law of *In Absentia* Removal

An alien who fails to appear at his removal hearing after proper notice shall be ordered removed "if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." INA § 240(b)(5), 8 U.S.C. § 1229a(b)(5). The *in absentia* order may be rescinded if: (i) a motion to reopen is filed within 180 days of the order and the person demonstrates that there were exceptional circumstances; or (ii) a motion to reopen is filed at any time and the person can demonstrate that failure to appear was due to lack of proper notice in accordance with INA § 239. INA § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C).

Aliens enjoy the right to effective assistance of counsel in removal proceedings. Mejia-Rodriguez v. Reno, 178 F.3d 1139, 1146 (11th Cir. 1999). This right derives from the Due Process Clause of the Fifth Amendment, as opposed to the Sixth Amendment. Id. Thus, to establish the ineffective assistance of counsel in the context of a deportation proceeding, an alien must establish that her counsel's performance was deficient to the point that it impinged the "fundamental fairness" of the hearing. Id. The alien must establish deficient representation and prejudice arising from this deficient representation. Id. The BIA has held that an alien alleging ineffective assistance of counsel who had satisfied the requirements of Matter of

Lozada had established exceptional circumstances for the purposes of rescinding an *in absentia* removal order. Matter of Grijalva-Barrera, 21 I&N Dec. 472, 473-474 (BIA 1996).

In Matter of Lozada, the BIA held that:

> A motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts. . . . [T]hat affidavit should include a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken on appeal and what counsel did or did not represent to the respondent in this regard. Furthermore, before allegations of ineffective assistance of former counsel are presented to the Board, former counsel must be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel or report of counsel's failure or refusal to respond, should be submitted with the motion. Finally, if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities

> regarding such representation, and if not, why not.

19 I&N Dec. 637, 638-39 (BIA 1988).

2. The majority of circuits recognize that the 180-day deadline is not jurisdictional

The First, Second, Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits all have held that the 180-day filing deadline for motions to reopen *in absentia* removal orders is not jurisdictional, and therefore have adopted equitable tolling doctrines in cases where the 180-day filing period was not met due to ineffective assistance of counsel. Jobe v. INS, 238 F.3d 96, 100-101 (1st Cir 2001) (recognizing equitable tolling, but dismissing because the alien failed to exercise due diligence); Iavorski v. INS, 232 F.3d 124, 129 (2d Cir. 2000) (concluding that the 180-day bar is not jurisdictional, but finding that the alien did not exercise due diligence); Borges v. Gonzales, 402 F.3d 398 (3d Cir. 2005); Akwada v. Ashcroft, 113 Fed. Appx. 532 (4th Cir. 2004); Scoreanu v. INS, 339 F.3d 407, 413 (6th Cir. 2003); Pervaiz v. Gonzales, 405 F.3d 488, 491 (7th Cir. 2005); Rodriguez-Lariz v. INS, 282 F.3d 1218, 1224 (9th Cir. 2002); Riley v. INS, 310 F.3d 1253, 1258 (10th Cir. 2002).

The Third Circuit has recognized that the 180-day time period for filing a motion to reopen an *in absentia* removal order is not jurisdictional but is more in the nature of a statute of limitations, which can be equitably tolled. In Borges, 402 F.3d at 398, the alien hired counsel who advised him that he did

not need to attend his removal hearing because he had a pending application for adjustment of status. Hence, the alien was ordered removed *in absentia*. Id. at 401. The alien's attorney filed a timely motion to reopen, but this motion only challenged the denial of a request for change of venue, and did not address the reasons for the failure to appear. Id. at 402. Acting on his attorney's advice and believing that his removal order had been vacated, the alien attended his adjustment of status interview and did not mention that he had been ordered removed. He was approved for permanent residence. The alien later called his attorney to ask whether it was okay for him to travel outside the United States since he had never received a green card in the mail. He was told at this point for the first time, more than two years after the *in absentia* order had been entered, that the order of removal never had been vacated. The attorney agreed to file a second motion to reopen, but never did so. The alien called the attorney regularly over the next two years, and the attorney led him to believe the motion had been filed and was still under consideration. In January 2003, five years after the *in absentia* order had been entered, the alien retained new counsel, who filed a second motion to reopen. Id. at 402-403.

The alien in Borges argued that the attorney's fraudulent representations "led the alien to believe that he had nothing to worry about and kept him from discovering how serious his situation was and that, in fact, he remained under an *in absentia* order of removal." Id. at 403. Hence, he argued that the 180 day period for filing the motion to reopen should be tolled until the date that he learned of the fraud.

Overruling the BIA, the Third Circuit held that the 180-day time limit was not jurisdictional because it was more in the nature of a statute of limitations. Id. at 406. The Court noted that there is no reference to jurisdiction in the statute or in the legislative history. It concluded that "[g]iven this silence, we see no 'good reason to believe that Congress did *not* want the equitable tolling doctrine to apply.'" Id. (citing United States v. Brockamp, 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 8181 (1997) (emphasis in original)). The Third Circuit also noted that it had long accepted the "old chancery rule" that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." Id. at 406 (citing Lopez v. INS, 184 F.3d 1097, 1100 (9th Cir. 1999)). It held that "[t]his equitable doctrine is read into every federal statute of limitation." Id. (*quoting* Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S. Ct. 582, 90 L. Ed. 2d 743 (1946) (emphasis in original)).

In Borges, the Third Circuit distinguished the Eleventh Circuit's decision in Anin v. Reno, 188 F.3d 1273, 1278-79 (11th Cir. 1999), which held that there is no "exception" to the 180-day rule based on ineffective assistance of counsel. Borges, 402 F.3d at 406. The Third Circuit held that "here, however, we are dealing with tolling to permit reopening after 180 days based on the allegations of fraud, not an exception on the ground of ineffective assistance of counsel to the 180-day time period excusing a failure to appear." Id. Hence, the Third Circuit concluded, Anin did not impact its analysis. Id.

3. Courts have recognized that ineffective assistance of counsel can be the basis for equitable tolling where it rises to the level of fraud

The Seventh Circuit has recognized that ineffective assistance of counsel can be a basis to entitle an alien to equitable tolling. Pervaiz v. Gonzales, 405 F.3d 488, 491 (7th Cir. 2005). In Pervaiz, an asylum applicant missed her individual hearing and was removed *in absentia* because the hearing was moved from 1 p.m. to 9 a.m., and notice of the change was sent only to her attorney and was not received. Id. at 489. The attorney filed a motion to reopen, but only addressed the adequacy of the notice and not the fact that the notice was never received. Id. The IJ denied this motion, and Pervaiz appealed that denial to the BIA. While the appeal was pending, Pervaiz retained another lawyer who filed a second motion to reopen before the BIA, arguing that the first motion would have been granted but for the ineffective assistance of former counsel. This second motion to reopen was filed one year and three months after the *in absentia* removal order. Id. The BIA denied the appeal of the first motion to reopen on the ground that the notice was adequate, and denied the second motion to reopen as untimely. Id. at 490.

The Seventh Circuit first found that the 180-day deadline is not jurisdictional and therefore was subject to equitable tolling, noting that several other circuits agreed. Pervaiz, 405 F.3d at 490. Next, the Court noted that the test for equitable tolling was not the length of the delay but whether the claimant

could reasonably have been expected to file earlier. Pervaiz, 405 F.3d at 490. The Court noted that, because it was manifestly unjust for the IJ to remove the alien *in absentia* when she was only four hours late for her hearing and her tardiness was based on not receiving notice, the alien could have reasonably expected for her motion to reopen to be granted. Id. at 490-491. When that motion was denied, the alien had to find another lawyer, and although it took her nine months to find the lawyer, have him review the case, prepare the motion and file it, the Court could not say as a matter of law that the BIA could not find the deadline equitably tolled. Id. at 491. The Seventh Circuit further found that Pervaiz could demonstrate ineffective assistance because her attorney failed to argue that lack of receipt of the notice of hearing excused her failure to appear, which would have been successful in that Circuit. Hence, the Court remanded that case.

The Ninth Circuit has found ineffective assistance that rose to the level of fraudulent where the alien's representative "wasted" the opportunity for filing a motion to reopen by filing a "worthless motion." Varela v. INS, 204 F.3d 1237, 1240 (9th Cir. 2000). In Varela, the alien's attorney advised him that he would be able to adjust his status based on marriage to a U.S. citizen after he accepted an order of voluntary departure as long as he applied before the deadline for him to depart. This information was incorrect, and the alien was served with an order of deportation when he did not depart. Id. at 1238. The attorney filed a motion to reopen, which was denied because it was untimely and he did not establish *prima facie* eligibility for adjustment of

status. The alien then hired new counsel, who filed a second motion to reopen, but the BIA affirmed the denial of that motion because the regulations prohibit aliens in deportation proceedings from filing *more than one* motion to reopen. Id. at 1239.

In granting the petition for review, the Ninth Circuit held that the alien was "defrauded by an individual purporting to provide legal representation." Varela, 204 F.3d at 1240. The Court noted:

> Garcia took Varela's money, but filed no papers for over ten months. When Varela inquired about his case, Garcia repeatedly assured him that he did not have to leave the United States when his grant of voluntary departure expired. Garcia wasted Varela's opportunity to reopen his deportation proceedings and apply for adjustment of status by filing a worthless motion. The motion served no purpose because it was filed after the statute of limitation had expired and provided no facts to justify equitable tolling.

Id. Hence, the Ninth Circuit granted the petition and remanded for the BIA to consider the merits of the motion to reopen. Id.

4. The Eleventh Circuit's refusal to adopt the reasoning favored by a majority of the Circuits is arbitrary and unreasonable

In denying Petitioner's petition for review, the Eleventh Circuit cited its precedent in Anin v. Reno, 188 F.3d 1273 (11th Cir. 1999), for its refusal to adopt equitable tolling. In Anin, an alien moved to reopen his in absentia removal order two years after it had been entered, arguing that his counsel had failed to give him notice of his hearing and then later told him that he already had the case reopened. 188 F.3d at 1275. The Eleventh Circuit affirmed the denial of the motion to reopen as untimely. The Court's reasoning was that "[n]o federal circuit has recognized an exception to the INA's 180 day filing deadline for exceptional circumstances to reopen a deportation order." Id. at 1278.

Accordingly, the Eleventh Circuit's rationale for refusing to adopt an exception to the 180-day filing rule for ineffective assistance of counsel is unreasonable. As can be seen from the discussion above, the line of cases in the other Circuits adopting equitable tolling all developed after the Eleventh Circuit decided Anin in 1999. The reasoning in Anin no longer applies, because several circuits now have adopted that exception. Hence, it was unreasonable of the Eleventh Circuit to rely on Anin in denying Petitioner's case.

The Eleventh Circuit's refusal to consider equitable tolling in this case amounts to a clear violation of Petitioner's due process rights.

Petitioner had a clear avenue for relief from removal in that she was married to a U.S. citizen. Petitioner was prevented from going to court and applying for that relief solely based on the deficient actions of her attorney. For the Eleventh Circuit to refuse to remedy counsel's actions due to an arbitrary time limit is in clear violation of his Fifth Amendment right to due process of law. Therefore, this honorable Court should act to cure a Circuit split and to remedy a clear constitutional error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

H. Glenn Fogle, Jr.
Attorney for Petitioner

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14750
Non-Argument Calendar

[FILED APRIL 4, 2007]

BIA No. A79-664-943

ROSALINE KENNEDY,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

Before TJOFLAT, HULL and FAY, Circuit Judges.

PER CURIAM:

An Immigration Judge ("IJ") ordered Rosaline Kennedy removed in absentia after she failed to appear for her removal hearing. After two unsuccessful attempts to reopen her removal proceedings and the IJ's denial of her motion to reconsider the second motion to reopen, Kennedy appealed the IJ's order denying reconsideration to the Board of Immigration Appeals ("BIA"). The

BIA affirmed the IJ's denial of Kennedy's motion to reopen and rescind the in absentia order, refusing to consider Kennedy's exceptional circumstances claim because none of Kennedy's motions were filed within the 180-day statutory period. Kennedy petitions for review of the BIA's order, urging us to adopt a doctrine of equitable tolling of the 180-day period in which to file a motion to reopen in absentia removal proceedings based on exceptional circumstances, and arguing that equitable tolling was warranted in her case because she did not receive notice of her hearing or file a timely motion to reopen due to ineffective assistance of counsel. For the reasons set forth more fully below, we deny the petition.

We review the denial of a motion to reopen for abuse of discretion.[1] Anin v. Reno, 188 F.3d 1273, 1276 (11th Cir. 1999). An order of removal, entered in absentia, may be rescinded only

(I) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive

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[1] Procedurally, Kennedy's appeal to the BIA was from the IJ's denial of her motion to reconsider her motion to reopen the in absentia removal order. However, the BIA stated that Kennedy was appealing the IJ's denial of her motion to reopen and rescind. We likewise review the denial of a motion for reconsideration for abuse of discretion. Assa'ad v. U.S. Att'y Gen., 332 F.3d 1321, 1341 (11th Cir. 2003).

notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

8 U.S.C. § 1229a(b)(5)(C), INA § 240(b)(5)(C); see also 8 C.F.R. § 1003.23(b)(4)(ii) (same).

In Anin, "[w]e held that the 180-day time limitation for motions to reopen filed pursuant to former INA § 242B(c)(3)(A), 8 U.S.C. § 1252b(c)(3)(A) (repealed 1996), for in absentia deportation orders could not be equitably tolled on account of ineffective assistance of counsel."[2] Abdi v. U.S. Att'y Gen., 430 F.3d 1148, 1149-50 (11th Cir. 2005). We determined that this provision was "jurisdictional and mandatory." Anin, 188 F.3d at 1278. We applied this reasoning in Anin to a

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[2] The statute we considered in Anin stated:

(3) Rescission of order.

Such an order may be rescinded only—

(A) upon motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2) of this section), or

(B) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2) of this section or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien.

Anin, 188 F.3d at 1276 n.4.

motion to reopen under 8 U.S.C. § 1229a(c)(7), INA § 240(c)(7)[3] on the ground of ineffective assistance, which was filed after the expiration of the 90-day deadline for filing such a motion. Abdi, 430 F.3d at 1149-50. Although we recognized that the 90-day period may be subject to equitable tolling in very limited circumstances, id. at 1149, we held that ineffectiveness of counsel did not qualify. We said in Anin that this 90-day filing period "is mandatory and jurisdictional, and, therefore, it is not subject to equitable tolling. We say this because our reasoning in Anin is not specific to in absentia orders." Id. at 1150. Accordingly, we held that the BIA did not abuse its discretion in denying the motion to reopen. Id.

Under Anin and Abdi, we do not recognize equitable tolling based upon alleged ineffectiveness

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[3] This provision permits the filing of a motion to reopen, which "shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material." 8 U.S.C. § 1229a(c)(7)(A), (B), INA § 240(c)(7)(A), (B). "A motion to reopen proceedings shall not be granted unless it appears to the [BIA] that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(1).

of counsel and we hold that the BIA did not abuse its discretion in declining to consider Kennedy's exceptional circumstances claim because she did not file a motion to reopen within the 180-day filing period. In light of the foregoing, the petition for review is

DENIED.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church. Virginia 22041

Monge, Jose F., Esquire
339 W Butler Street
Lexington, SC 29072-2605

Office of the District Counsel/ATL
77 Forsyth St., Room 385
Atlanta, GA 30303

Name: ROSALINE KENNEDY **A79-664-943**

Date of this notice: 08/09/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/Donna Carr
Donna Carr
Acting Chief Clerk

Enclosure

Panel Members:
PAULEY, ROGER

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

[FILED AUGUST 9, 2006]

File: A79 664 943 – Atlanta

Date: August 9, 2006

In re: ROSALINE KENNEDY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Jose F. Monge, Esquire

APPLICATION: Reopening

ORDER:

PER CURIAM. The respondent appeals from an Immigration Judge's decision denying her motion to reopen and rescind an in absentia order that was entered on Marchl6, 2004. The Immigration Judge's decision denying reopening is affirmed. The record supports the Immigration Judge's finding that notice of the hearing was provided in a manner that was reasonably calculated to reach the respondent. *Dominguez v. U.S. Attorney General*, 284 F.3d 1258 (11th Cir. 2002). As the respondent points out in her

appeal brief, the court sent the hearing notice to the same post office box where the Notice to Appear was successfully received by the respondent the month before the hearing notice was mailed (Brief at 2-3). Further, she concedes in her brief that she was continuing to use the same the post office address for her mail at the time when the hearing notice was sent. Therefore, even assuming, arguendo, that she was not also obligated to inform the court of the change in where she was physically residing, it is undisputed that the notice was sent to the address that she last provided to the court, and that this was the address that she maintains she continued to use and that she wanted to be used for mail delivery at the relevant time. We will not consider her exceptional circumstances claim because not one of her three motions was filed within the 180-day statutory period. *Anin* v. *Reno,* 188 F.3d 1273, 1278 (11th Cir. 1999) (time period in statute for motions to reopen in absentia proceedings is jurisdictional and mandatory). The appeal is dismissed.

/s/ Roger Pauley
FOR THE BOARD

UNTIED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
United States Immigration Court
77 Forsyth Street, Room 112
Atlanta, Georgia 30303

IN THE MATTER OF	)	
	)	
Rosaline KENNEDY	)	File No. A79 664 943
	)	
Respondent	)	

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act (INA or Act), as amended, in that, at after admission as a nonimmigrant under section 101(a)(15) of the Act, you remained in the United States for a period longer than permitted.

APPLICATION: Motion to Reconsider/Motion to Stay

APPEARANCES

ON BEHALF OF RESPONDENT:
Rachael Effron, Esq.
3350 Peachtree Road, Suite 1600
Atlanta, Georgia 30326

ON BEHALF OF THE DHS:
Assistant Chief Counsel
77 Forsyth Street, Room 365
Atlanta, Georgia 30303

ORDER

On March 16, 2004, the Respondent failed to appear for her hearing and was ordered removed in absentia to Brazil. On July 19, 2005, a motion to reopen was filed on behalf of the Respondent. The motion was denied by the Court on July 22, 2005.

On August 31, 2005, a second motion to reopen was filed. On September 13, 2005, the Respondent's second motion to reopen was amended with supplemental documentation. This motion was denied on September 22, 2005.

On October 24, 2005, Respondent, through counsel, filed a motion to reconsider and a motion to stay. This motion now includes evidence that a bar complaint has been filed against the Respondent's prior attorney. The Respondent married an United States citizen on February 12, 2004. The Respondent claims to have an approved I-130 as of July 22, 2005, however, has not demonstrated any proof of the approved petition.

The government has not joined this motion.

This motion will be denied.

A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the

Immigration Judge's prior decision and shall be supported by affidavits and other evidentiary material. However, the Respondent's motion does not cite any errors of fact or law in the prior two decisions.

In the first denial of the Respondent's motion to reopen, the court found that the Respondent was chargeable as having received notice of hearing pursuant to United States v. Dominguez, 28 F.3d 1258 (11th Cir. 2002) and that the motion to reopen was untimely. 8 C.F.R. §3.23 (b)(4)(iii)(l).(The motion was not filed within 180 days of entry of an *in absentia* order of removal.)

The second motion to reopen was denied because a previous motion to reopen had been filed, 8 C.F.R.§3.23(b)(4)(ii); it was not joined by the government, and the Respondent failed to comply with the requirements of Matter of Lozado, 19 I&N Dec. 637 (BIA 1988). In Gbya v. United States Attorney General. 2003 WL 21961804 (11th Cir. August 19, 2003), the Eleventh Circuit affirmed the Board of Immigration Appeals, finding that the Board "does not abuse its discretion by filtering ineffective assistance of counsel claims through the screening requirements of Lozado" and the petitioner did not comply with those requirements.

While the Ninth Circuit held that an equitable tolling of the one motion rule may be proper in cases of ineffective assistance of counsel is alleged, the Eleventh Circuit provides no such guidance. See Rodriquez-Lariz v. INS, 282 F.3d 121 (9th Cir. 2002). Herein , the Respondent acknowledged service of the

Notice to Appear (NTA), as previously noted by the court in the first denial. A Respondent, who acknowledged receipt of the Notice to Appear (NTA), bears the responsibility of notifying the court of any change of address. The reverse side of the NTA clearly states the following:

> **Failure to appear:** You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Counsel, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

The court therefore, finds that equitable tolling is not applicable. Furthermore, the affidavit submitted from prior counsel does not state that he informed the Respondent not to advise the Government or the Court of any change of address. While it is acknowledged that prior counsel did not file an EOIR 28 until the first motion to reopen was filed, the filing

of an EOIR 28, notice of representation, by the attorney, does not relieve Respondent of her obligation to notify the court and the INS of any change of address. These issues were addressed and considered in the prior motions to reopen.

The second motion to reopen was filed and supplemented and thereafter denied. A motion to reconsider is limited to errors of fact or law. No errors have been cited. The Government has not joined this motion.

Accordingly, the following order will be entered:

ORDER

It is Ordered that:
The Respondent's motion to reopen/stay be DENIED.

It is further Ordered that:
The Respondent be REMOVED from the United States to Brazil pursuant to the order of this court dated March 16, 2004.

Date: 10/26/2005

/s/ William A. Cassidy
William A. Cassidy
United States Immigration Judge

65

(2)

Supreme Court, U.S.
FILED
SEP 05 2007
OFFICE OF THE CLERK

No. 06-1603

In the Supreme Court of the United States

ROSALINE KENNEDY, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Board of Immigration Appeals (BIA or Board) did not abuse its discretion in denying petitioner's motion to reconsider the denial of petitioner's second untimely motion to reopen her removal proceedings based on allegations of ineffective assistance of counsel.

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In the Supreme Court of the United States

No. 06-1603

ROSALINE KENNEDY, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter*, but is reprinted in 227 Fed. Appx. 786. The decisions of the Board of Immigration Appeals (Pet. App. 8a-9a) and the immigration judge (Pet. App. 10a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2007. The petition for a writ of certiorari was filed on June 1, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that removal proceedings

brought under 8 U.S.C. 1229a (2000 & Supp. V 2005) are initiated by a written Notice to Appear served in person on the alien, or, if personal service is not practical, "through service by mail to the alien or to the alien's counsel of record." 8 U.S.C. 1229(a)(1). The Notice to Appear must identify, among other things, the nature of the proceedings, the conduct alleged to be unlawful, and the charges against the alien. 8 U.S.C. 1229(a)(1)(A), (C), and (D). The Notice must also inform the alien of her obligations to provide the Attorney General with an address at which she may be contacted and to "immediately" notify the Attorney General of any changes, and state that not doing so could result in failure to receive further notices and an order of removal being entered *in absentia*. 8 U.S.C. 1229(a)(1)(F)(i)-(iii), 1229a(b)(5).

b. Section 1229a sets forth procedures for the conduct of removal proceedings. In situations where an alien fails to appear, Section 1229a(b)(5)(A) provides that the alien "shall be ordered removed in absentia if the [Immigration and Naturalization] Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. 1229a(b)(5)(A).[1] "The written notice * * * shall be considered sufficient," this provision continues, "if provided to the most recent address provided under section 1229(a)(1)(F) of this title." *Ibid.*

Section 1229a(b)(5)(C) sets forth limited circumstances in which a removal order that was entered *in absentia* may be rescinded. "Such an order," it declares, "may be rescinded only—

---

[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. V 2005).

> (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section),[2] or
>
> (ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

8 U.S.C. 1229a(b)(5)(C).

2. Petitioner is a native and citizen of Brazil who overstayed a nonimmigrant visitor visa. Administrative Record (A.R.) 121. On October 3, 2002, petitioner filed an application to change her status based on her marriage to an American citizen. A.R. 183-186. On the application, petitioner gave her address as: "7101 Springer Road; Wilmington, NC 28410." A.R. 183. That application was later withdrawn after petitioner's husband announced that he did not wish to proceed, and the marriage was later annulled. A.R. 165.

3.a. On December 16, 2003, the Department of Homeland Security (DHS) issued a Notice to Appear alleging that petitioner was removable under 8 U.S.C. 1227(a)(1)(B), and was subject to removal as a result.

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[2] The statute defines "exceptional circumstances" as "refer[ring] to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. 1229a(e)(1) (Supp. V 2005).

A.R. 122, 189; see note 1, *supra*. The Notice to Appear was sent via regular mail to the last address petitioner had provided to DHS: the Springer Road residence listed on petitioner's October 2002 application for adjustment of status. A.R. 183, 189.

Unbeknownst to DHS, petitioner had changed her mailing address. At some point between her October 2002 application and the December 16, 2003 Notice to Appear, petitioner obtained a post office box in Wilmington, North Carolina and directed the Postal Service to forward mail from the Springer Road residence to that box. A.R. 165. Although petitioner acknowledges that she did not inform DHS of her new address, she has conceded that she personally received a copy of the Notice to Appear in "December 2003." Pet. 4; see A.R. 165.

The Notice to Appear contained all of the information required by 8 U.S.C. 1229(a)(1). It informed petitioner that her hearing would be held at a time set by the Office of the Immigration Judge, and that notice of the hearing "will be mailed to the address provided by [petitioner]." A.R. 189; see A.R. 190 ("Notices of hearing will be mailed to this address."). The Notice to Appear also stated that petitioner was required to "notify the Immigration Court immediately * * * whenever you change your address." *Ibid.* Finally, the Notice stated that if petitioner failed to attend the hearing at the "date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence." *Ibid.* Despite these instructions, petitioner never notified DHS or the Immigration Court that she had changed her address. Pet. 5.

On February 12, 2004, the Immigration Court mailed a Notice of Hearing in Removal Proceedings to peti-

tioner at the Springer Road address. A.R. 187-188. The hearing was scheduled for March 16, 2004. *Ibid.* Petitioner did not appear at the hearing, and, on March 16, 2004, an immigration judge (IJ) entered an *in absentia* order directing that petitioner be removed to Brazil. A.R. 182.

b. On July 12, 2005—483 days after entry of the order of removal—petitioner filed a motion with the Immigration Court to reopen her removal proceedings. A.R. 165-168. In that initial motion, petitioner asserted that she had not learned about her March 16, 2004 removal hearing or the IJ's *in absentia* removal order until her attorney inquired as to whether a removal hearing had been scheduled. A.R. 166-167. Although the motion stated that petitioner had submitted a second application for adjustment of status to United States Customs and Immigration Service (USCIS) in DHS in April 2004 that contained her new address, A.R. 166, it did not acknowledge petitioner's failure to update her address with the Immigration Court in the Department of Justice either before or after she received the December 16, 2003 Notice to Appear or at any time before the removal hearing. Nor did the motion address petitioner's failure to seek reopening within the 180-day period specified in 8 U.S.C. 1229a(b)(5)(C)(i), or assert that petitioner had failed to "receive notice in accordance with paragraph (1) or (2) of [8 U.S.C] 1229(a)," see 8 U.S.C. 1229a(b)(5)(C)(ii).

On July 22, 2005, the IJ denied petitioner's motion. A.R. 124-126. Petitioner's receipt of the Notice to Appear, the IJ reasoned, had given petitioner notice that she was subject to removal proceedings and had clearly informed petitioner of both her obligation to ensure that the Immigration Court had her current address and the

possible consequences of failing to do so. A.R. 125. The IJ also determined that petitioner satisfied none of the bases set forth in 8 U.S.C. 1229a(b)(5)(C) for rescinding an *in absentia* removal order. A.R. 125-126. Petitioner did not appeal the IJ's decision to the BIA.

c. On August 31, 2005, petitioner, now represented by new counsel, filed a second motion to reopen her removal proceedings. A.R. 144-149. In the second motion, petitioner claimed that her failure to attend her removal hearing was the result of "exceptional circumstances," which she identified as the "ineffective assistance" of her former attorney in failing to file the proper change of address forms, instruct petitioner to do so, or contact the Immigration Court for a status update regarding petitioner's removal hearing. A.R. 144-147.

Although the BIA's decision in *In re Lozada*, 19 I. & N. Dec. 637, 639, review denied, 857 F.2d 10 (1st Cir. 1988), ordinarily requires, as a condition for relying on asserted ineffective assistance of counsel, "that disciplinary authorities be notified of breaches of professional conduct," petitioner conceded that she had not done so, see A.R. 147. Instead, the motion appended an affidavit of the former counsel, Kenneth Hatcher. A.R. 152-154. The affidavit described the services counsel performed for petitioner in connection with submitting an application for adjustment of status with USCIS in DHS, A.R. 152-153, but did not state that Hatcher had been retained by petitioner to represent her in the separate removal proceedings before an IJ in the Department of Justice. Also, although counsel stated that he "did not recognize" that there was a problem with petitioner's receiving mail or that mail was being forwarded by a Postal Service forwarding order, and that he "failed to advise" petitioner to notify the government of a

change of address, A.R. 152, he did not identify any circumstances that should have led him to recognize any problem with petitioner's receipt of mail or to reiterate the notice petitioner receive in the Notice to Appear that she should inform the Immigration Court of any change of address. Finally, petitioner did not acknowledge in her motion that 8 U.S.C. 1229a(b)(5)(C)(i) declares that "exceptional circumstances" rescissions are available *only* where the "motion to reopen [is] filed within 180 days after the date of the order of removal," and she did not assert that the 180-day period is subject to equitable tolling.

On September 22, 2005, the IJ denied petitioner's second motion to reopen on the grounds that petitioner had already filed one such motion, and that petitioner had failed to comply with the requirements of *Lozada*, *supra*. A.R. 119. The IJ also reiterated that the Notice to Appear had given petitioner notice of the need to update her address with the Immigration Court. *Ibid.* Petitioner again did not appeal the IJ's denial of her motion to the BIA.

d. On October 24, 2005, petitioner filed with the IJ a motion to reconsider the denial of her second motion to reopen. A.R. 71-76. In that motion, petitioner attached a bar complaint filed against her previous attorney. A.R. 72, 79. In her motion to reconsider, petitioner acknowledged that the Notice to Appear had informed her of her obligation to keep her address up to date, but stated that she had relied upon the advice of her "experienced immigration law attorney" that she should "wait for a hearing notice." A.R. 72-73. In support of her motion to reconsider, petitioner and her new husband stated that they had retained Hatcher to represent them in seeking adjustment of status before USCIS; they did

not, however, state that the retainer extended to representing petitioner before the Immigration Court, see A.R. 82-83, 85, and Hatcher did not enter a notice of appearance on petitioner's behalf with the Immigration Court, A.R. 73. Once again, petitioner neither acknowledged the 180-day deadline, nor argued that the period could be tolled.

On October 26, 2005, the IJ denied petitioner's motion for reconsideration. Pet. App. 10a-14a. The IJ first identified a procedural defect with petitioner's motion: Although "[a] motion to reconsider shall * * * specify[] the errors of fact or law in the Immigration Judge's prior decision," petitioner's motion had not "cite[d] any errors of fact or law in the prior two decisions." *Id.* at 11a-12a; see 8 U.S.C. 1229a(c)(6)(C) (Supp. V 2005). In addition, although petitioner had not raised the issue, the IJ also concluded "that equitable tolling is not applicable," because petitioner had "acknowledged service of" a document that clearly advised her of her duty to keep her address up to date and because the affidavit filed by petitioner's former attorney "does not state that he informed [petitioner] not to advise the Government or the Court of any change of address." Pet. App. 12a-13a.

e. Petitioner appealed this ruling to the BIA. A.R. 7-20, 29-46. On that appeal, petitioner acknowledged for the first time that both of her motions to reopen had failed to comply with the 180-day time limit. A.R. 23. And, as pertinent here, petitioner also asserted, in one sentence, that the IJ "erred in holding that equitable tolling did not apply in this case." A.R. 58.[3]

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[3] Petitioner's other argument before the BIA was that her attorney's alleged ineffectiveness had caused her to lack "actual notice" of the removal hearing, which, she suggested, caused her to "fit within the [8 U.S.C. 1229a](b)(5)(C)(ii) exception for 'lack of notice.'" A.R. 24.

The BIA dismissed petitioner's appeal. Pet. App. 8a-9a. The BIA stated that the notice of hearing "was reasonably calculated to reach [petitioner]," because it had been sent "to the same post office box where the Notice to Appear was successfully received by [petitioner] the month before the hearing notice was mailed," and because petitioner had "concede[d] in her brief that she was continuing to use the same * * * post office address for her mail at the time when the hearing notice was sent." *Ibid.*[4] In addition, the BIA declined to consider petitioner's "exceptional circumstances claim because not one of her three motions was filed within the 180-day statutory period." *Id.* at 9a (citing *Anin* v. *Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999)).

4. A unanimous panel of the Court of Appeals for the Eleventh Circuit denied a petition for review in an unpublished per curiam opinion. Pet. App. 1a-5a. Citing its earlier decisions in *Anin, supra*, and *Abdi* v. *United States Attorney General*, 430 F.3d 1148 (11th Cir. 2005), see Pet. App. 3a-4a, the court of appeals concluded that the 180-day period set forth in 8 U.S.C. 1229a(b)(5)(C)(i)

Petitioner does not renew that claim before this Court, and it is without merit in any event. See 8 U.S.C. 1229a(b)(5)(C)(ii) (stating that motion to reopen proceedings may be "filed at any time if the alien demonstrates that the alien did not receive notice *in accordance with paragraph (1) or (2) of section 1229(a)*" (emphasis added)).

[4] As noted earlier (pp. 4-5, *supra*), both the Notice to Appear and Notice of Hearing were actually mailed to the Springer Road address that petitioner had provided to DHS in 2002. It is undisputed, however, that petitioner actually received the Notice to Appear after it was forwarded to the post office box she was using. Pet. 4. In her original motion to reopen her removal proceedings, moreover, petitioner stated that she maintained the post office box "until May 2004," A.R. 165, which was several months after the Notice of Hearing was mailed, A.R. 187-188.

cannot be tolled "based upon alleged ineffectiveness of counsel," Pet. App. 4a. Accordingly, the court of appeals held that "the BIA did not abuse its discretion in declining to consider [petitioner's] exceptional circumstances claim because she did not file a motion to reopen within the 180-day filing period." *Id.* at 5a.

ARGUMENT

Petitioner contends (Pet. 7-17) that the Eleventh Circuit's refusal to require the BIA to apply equitable tolling in the circumstances of this case was both erroneous and conflicts with the decisions of other courts of appeals. Further review is not warranted, because the Eleventh Circuit's unpublished decision is correct, no other court of appeals would hold that the BIA abused its discretion in refusing to apply equitable tolling on these facts, and petitioner would be unable to obtain relief even if equitable tolling were sometimes available.

1. The BIA did not abuse its discretion in affirming the IJ's denial of petitioner's motion to reconsider its earlier denial of petitioner's second untimely motion to reopen her removal proceedings. Whether a given statutory time limitation is subject to equitable tolling is ultimately a matter of statutory construction. See, *e.g.*, *United States* v. *Brockamp*, 519 U.S. 347, 349-354 (1997). In addition, this Court's decisions confirm that the BIA's reasonable constructions of the immigration statutes that it administers are entitled to *Chevron* deference, including in situations where those interpretations are announced in the course of adjudicating individual cases. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

In two decisions issued in 1998, the BIA concluded that the 180-day deadline for motions to reopen proceed-

ings based on "exceptional circumstances" contained in former 8 U.S.C 1252b(c)(3)(A) (1994)—a provision whose language was in all material respects identical to the one at issue in this case[5]—contained no "exception" for situations "where the failure to timely file a motion to reopen is due to ineffective assistance of counsel." *In re Lei*, 22 I. & N. Dec. 113 , 116 (B.I.A. 1998); see *In re A-A-*, 22 I. & N. Dec. 140, 143 (B.I.A. 1998). The statutory language, the Board stressed, clearly stated that deportation orders could be rescinded "*only*" in the specifically enumerated circumstances, and contained "no exceptions to [the 180-day] time bar." *Lei*, 22 I. & N. Dec. at 116; *A-A-*, 22 I. & N. Dec. at 143. The BIA also explained that its interpretation was "consistent with the overall statutory scheme," because the broader provision of which the relevant language was a part had been "enacted to provide stricter and more comprehensive deportation procedures, particularly for in absentia hearings, to ensure that proceedings are brought to a

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[5] Former Section 1252b(c)(3) provided that an order of deportation entered in *absentia* could be rescinded "only—

(A) upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2) of this section), or

(B) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2) of this section or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien.

8 U.S.C. 1252b(c)(3) (1994). This provision was repealed by Section 308(b)(6) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-615, and redesignated as 8 U.S.C. 1229a by IIRIRA Section 304(a)(3), Div. C, 110 Stat. 3009-589. See pp. 2-3, *supra* (quoting current Section 1229a(b)(5)(C)).

conclusion with meaningful consequences." *Lei*, 22 I. & N. Dec. at 116; *A-A-*, 22 I. & N. Dec. at 144.

The BIA's conclusion that allegations of ineffective assistance of counsel are insufficient to prevent the running of the 180-day time period for filing motions to reopen based on exceptional circumstances is entirely reasonable and thus entitled to deference by the courts. Section 1229a(b)(5)(C) states that an *in absentia* removal order may be rescinded "only" in three specified circumstances—where the alien's failure to attend the removal hearing was due to "exceptional circumstances," where the alien "did not receive notice in accordance with [8 U.S.C. 1229(a)(1) or (2)]", or where imprisonment prevented the alien from attending the hearing. 8 U.S.C. 1229a(b)(5)(C)(i) and (ii). Of the enumerated grounds, only one—the provision under which petitioner seeks relief—contains a time limitation. That "explicit listing" of provisions as to which time limits do and do not apply demonstrates "that Congress did not intend [the agency or] courts to read other unmentioned, open-ended 'equitable' exceptions into the statute that it wrote." *Brockcamp*, 519 U.S. at 352.

In addition, "the nature of the underlying subject matter" (*Brockcamp*, 519 U.S. at 352) reinforces the conclusion that Congress did not intend to permit equitable tolling based on claims of ineffective assistance of counsel. As this Court has explained, motions to reopen removal proceedings are "especially" disfavored because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). In addition, permitting aliens to avoid the 180-day time bar by claiming ineffective assistance of counsel would "waste the time and efforts of immigration judges called

upon to preside at [the] hearings" that would presumably be necessary whenever an alien could make a "prima facie" ineffectiveness claim. *INS* v. *Abudu*, 485 U.S. 94, 108 (1988) (internal quotation marks and citations omitted).

2. Petitioner nonetheless asserts (Pet. 7) that this Court should grant review because of what she asserts is a "true split" involving whether equitable tolling is available in situations where an alien claims that her failure to comply with the 180-day time limitation was due to the"ineffectiveness" of the alien's privately retained attorney.[6] Petitioner is mistaken; in fact, it is

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[6] Although it is not the ground upon which she seeks a writ of certiorari, petitioner errs in suggesting (Pet. 8) that "[a]liens enjoy the right to effective assistance of counsel in removal proceedings." An alien in removal proceedings has a statutory right to be represented by counsel of the alien's choice at no expense to the government. 8 U.S.C. 1229a(b)(4)(A). This Court has never held, however, that the Constitution requires the government to appoint counsel for aliens in removal proceedings. And in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), a habeas corpus case, the Court held that, when the Constitution does *not* require the government to provide counsel, the ineffectiveness of privately retained counsel does not violate the Constitution. *Id.* at 754; see *Wainwright* v. *Torna*, 455 U.S. 586 (1982) (per curiam) (no basis for constitutional claim of ineffective assistance of counsel in seeking discretionary state supreme court review of criminal conviction, because there is no constitutional right to counsel in that setting).

There is no obvious reason why the result should be different in the removal context. As Judge Easterbrook has explained:

> The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering. Every litigant * * * is entitled to due process, but it has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome. The civil remedy is damages for malpractice, not a re-run of the original litigation.

Magala v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005) (citations

entirely likely that no court of appeals would have held that the BIA abused its discretion in declining to apply equitable tolling on the facts presented here.

a. Two of the published decisions that petitioner cites merely assumed without deciding that equitable tolling is sometimes available under 8 U.S.C. 1229a(b)(5)(C)(i) before denying relief on other grounds. The First Circuit did not "recogniz[e] equitable tolling" (Pet. 10), in *Jobe* v. *INS*, 238 F.3d 96 (2001) (en banc). Rather, the court "dimiss[ed the alien's] petition without deciding whether the equitable tolling doctrine may apply to this statutory provision." *Id.* at 100. The same is true of *Scorteanu* v. *INS*, 339 F.3d 407 (6th Cir. 2003) (Pet. 10), where the court stated that it "need not decide * * * whether the statute is subject to equitable tolling because, even if this court were to so concede, Scorteanu has failed to prove entitlement to equitable relief." *Id.* at 413; see *Hernandez-Moran* v. *Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005) (similar).[7]

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omitted). Indeed, this Court has repeatedly held in other contexts that a party is bound by counsel's errors in civil proceedings. See *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-397 (1993); *United States* v. *Boyle*, 469 U.S. 241, 249-250 (1985); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962). Thus, although petitioner is correct that a number of courts have held that an alien has a constitutionally based claim of ineffective assistance of counsel in removal proceedings, this Court's decisions do not support that proposition.

[7] Petitioner also refers (Pet. 10) to the Fourth Circuit's unpublished decision in *Akwada* v. *Ashcroft*, 113 Fed. Appx. 532 (2004). In that case, the court of appeals assumed—again without deciding—that equitable tolling is sometimes available under certain regulations governing removal proceedings. See *id.* at 539 n.7 ("Because we do not find equitable tolling in this case, we need not reach the issue whether the statutory and regulatory time and number bars on motions to

b. Although the Third and Ninth Circuits have concluded that equitable tolling is sometimes available under Section 1229a(b)(5)(C)(i), both courts have carefully limited their holdings to situations in which the alien's failure to file a timely and otherwise proper motion was the result of fraud. In *Borges* v. *Gonzales*, 402 F.3d 398 (3d Cir. 2005) (Pet. 10), an alien alleged that his failure to attend his removal hearing had been due to ineffective assistance of counsel, and that his failure to file a timely motion to reopen his removal proceedings on that basis had been due to a paralegal's false statement that such a document had, in fact, been filed. See 402 F.3d at 402. Taking care to note that the alien's argument was *not* "that ineffective assistance of counsel can or should constitute an 'exception' to the 180-day time limit," *id.* at 405, the Third Circuit held that the period may be equitably tolled where an alien has been the victim of "fraud," which it defined as a situation in which the alien actually and reasonably relied on "false representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party." *Id.* at 407 (brackets in original; internal quotation marks and citation omitted).

The Ninth Circuit's decisions are similar. In *Lopez* v. *INS*, 184 F.3d 1097 (1999), that court held that the 180-day limitations period contained in the predecessor statute that the BIA construed in *Lei* and *A-A-* (see pp. 11-12 & note 5, *supra*), was subject to equitable tolling "where the alien's late petition [to reopen was] the result of the deceptive actions by a notary posing as an attorney." *Lopez*, 184 F.3d at 1100; see *id.* at 1098 ("We

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reopen removal proceedings are jurisdictional such that equitabl[e] tolling may never be employed to overcome them.").

conclude that the statutory time limit for reopening is tolled by the *fraudulent* representations made by Lopez's former 'counsel.'" (emphasis added)). In *Varela* v. *INS*, 204 F.3d 1237 (2000) (Pet. 14-15), the Ninth Circuit extended *Lopez*'s reasoning to "[a] federal regulation [that] places time and numerical limits on motions to reopen deportation proceedings" in situations where an alien attended the initial removal hearing. *Id.* at 1239 (citing 8 C.F.R. 3.2(c)(2) (2000)). Once again, however, the Ninth Circuit stressed that equitable tolling was available because the alien had been "*defrauded* by an individual purporting to provide legal representation." *Id.* at 1240 (emphasis added). *Rodriguez-Lariz* v. *INS*, 282 F.3d 1218 (9th Cir. 2002) (Pet. 10), construed the same regulation that had been at issue in *Varela*. 282 F.3d at 1223-1224. There, the Ninth Circuit concluded that equitable tolling was available because a non-lawyer to whom the aliens had given money to coordinate their removal proceedings had "missed the deadline for filing the application for suspension of deportation[,] * * * *lied* [to the aliens] about having done so," and later "compounded his mistakes and misrepresentations by advising the filing of a motion for reconsideration that prejudiced [the alien's] claims. *Id.* at 1224-1225 (emphasis added). In such circumstances, the court of appeals concluded, the advisor's actions "constitute the type of fraudulent representation that triggers equitable tolling under *Varela* and *Lopez*." *Id.* at 1225.

Here, petitioner neither alleges fraud, nor asserts facts that could establish the kind of fraudulent conduct deemed sufficient to warrant equitable tolling in *Borges*, *Lopez*, *Varela*, and *Rodriguez-Lariz*. Petitioner's questions presented describe the issue before this Court as

whether the 180-day period may be tolled based "ineffective assistance of counsel." See Pet. 3 (same); Pet. 17 (characterizing counsel's actions as "deficient"). Nor does the petition for a writ of certiorari allege anything that could fairly be characterized as "fraud" by petitioner's former attorney. Far from advising petitioner not to attend her removal hearing or misleading her into believing that a timely motion to reopen had been filed, see *Borges*, 402 F.3d at 401-402, petitioner asserts that the attorney failed expressly to reiterate an obligation—that is, to keep her mailing address up to date—of which petitioner was already on notice, and did not on his own initiative "call the Immigration Court information line to find out if [petitioner] already had a hearing scheduled." Pet 5.[8] Even taking these allegations at face value, silence and inaction fall far short of the sort of affirmative "false representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party" (*Borges*, 402 F.3d at 407) that would be necessary to support a finding of fraud. Accordingly, neither Third nor Ninth Circuit precedent would support the conclusion that the BIA abused its discretion in failing to apply equitable tolling in this case.

c. Petitioner is correct that the Second, Seventh, and Tenth Circuits have stated that ineffective assis-

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[8] In her brief to the BIA, petitioner claimed that she failed to advise the Immigration Court of her change of address "[i]n reliance on [her former attorney's] advice." A.R. 24. As the IJ noted (A.R. 69), however, there does not appear to be any evidence in the record that petitioner's attorney affirmatively advised her *not* to notify the Immigration Court that her address had changed. See A.R. 152 (affidavit by petitioner's former attorney: "I failed to advise [petitioner] to notify USCIS of a change of address").

tance of counsel may, at least in certain circumstances, justify equitable tolling of various statutory or regulatory limitations on motions to reopen removal proceedings. Two of the decisions she cites, however, do not even involve the statutory 180-day deadline for moving to reopen *in absentia* removal orders. All three of the decisions, moreover, predate this Court's recent clarification, in the habeas corpus context, that "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in [a] context where [litigants] have no constitutional right to counsel." *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085 (2007). As explained above (see note 6, *supra*), an alien has no constitutional right to have counsel furnished by the government in removal proceedings, and therefore, under *Coleman* v. *Thompson*, 501 U.S. 722 (1991), has no constitutionally based claim of ineffective assistance of counsel. Accordingly, to the extent that any of these decisions suggests that another court of appeals may have granted relief on the facts presented here, such a holding cannot survive *Lawrence*.

At any rate, it is highly unlikely that petitioner would have been able to obtain relief in any other circuit even before *Lawrence*. The relevant holding of *Iavorski* v. *INS*, 232 F.3d 124 (2d Cir. 2000) (Pet. 10), was that ineffective assistance of immigration counsel could sometimes warrant tolling a 90-day limitations period set forth in a 1996 Department of Justice regulation that is not at issue in this case. See 232 F.3d at 129-130.[9] In so holding, the Second Circuit relied on the text of the statute directing the Department of Justice to

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[9] The regulation was the same one at issue in the Ninth Circuit's decision in *Varela*, *supra*. See *Iavorski*, 232 F.3d at 131.

place limitations on the number of and time for filing motions to reopen and reconsider, "the Department of Justice's own interpretation of its rulemaking mandate from Congress, and the BIA's view of the rules that were promulgated." *Id.* at 130. In addition, moreover, the *Iavorski* court held that equitable tolling was unavailable as a matter of law in that case because the alien had failed to exercise "due diligence" during the period that he sought to have tolled. *Id.* at 134.[10] The Seventh and Tenth Circuits have likewise held that equitable tolling is unavailable absent a showing of due diligence by the alien. See *Pervaiz* v. *Gonzales*, 405 F.3d 488, 491 (7th Cir. 2005) (Pet. 10); *Riley* v. *INS*, 310 F.3d 1253, 1254-1255, 1258 (10th Cir. 2002) (involving alien who had attended initial removal hearing) (Pet. 10).

As the IJ found in this case (Pet. App. 12a-14a), petitioner would not be eligible for equitable tolling even were allegations of ineffective assistance of counsel sometimes sufficient to authorize it. Petitioner acknowledges that she received the December 16, 2003 Notice to Appear, and that she did so *only* because the Notice had been forwarded to her new post office box. Pet. 4; see A.R. 122, 189. Yet despite the fact that that notice clearly informed petitioner that a hearing would be scheduled for a later date and stressed that petitioner had an obligation to keep the Immigration Court

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[10] In *Zhao* v. *INS*, 452 F.3d 154 (2006) (per curiam), the Second Circuit found that the BIA had "erred" in refusing to find equitable tolling of both the time and number limits sets forth in 8 C.F.R. 1003.2(c)(2) based on the combination of "the ineffective assistance of the attorney who filed [the alien's] first motion to reopen" and the alien's "impressive diligence in retaining new counsel and promptly filing a new motion." *Zhao*, 452 F.2d at 160.

apprised of her most current address, A.R. 189-190, petitioner neither updated her address nor made any effort to contact the Immigration Court about her removal proceeding for nearly eighteen months, see Pet. 4. When petitioner finally did seek to reopen her removal proceedings, she made no effort to explain her failure to comply with the 180-day deadline for seeking to reopen an *in absentia* removal order, let alone to justify equitable tolling of that deadline, in *any* of the three motions that she filed with the IJ. In fact, it was not until her appeal to the BIA of the IJ's denial of her motion to reconsider the denial of her second untimely motion that petitioner even acknowledged her failure to comply with the statutory deadline. See pp. 5-8, *supra*. Under these circumstances, no court could be expected to find that petitioner exercised sufficient "due diligence in preserving [her] legal rights" to justify resort to the "sparingly" invoked doctrine of equitable tolling. *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990).

What is more, it is highly doubtful that petitioner could establish ineffective assistance by her former attorney in any event. In *Lozada*, *supra*, the Board stated that an alien claiming ineffective assistance of counsel in removal proceedings must "include a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken." 19 I. & N. Dec. at 639. Although petitioner, her husband, and Hatcher, her former counsel, all recounted in their affidavits that Hatcher was retained to represent petitioner and her husband in filing an application for adjustment of status with the USCIS in DHS, none of them stated that Hatcher had also been retained to represent petitioner in her separate removal proceed-

ings before the IJ in the Department of Justice. See pp. 6-8, *supra*. And before this Court, petitioner states only that she paid Hatcher "$1065 in anticipation of getting married and filing an adjustment of status for [petitioner]." Pet. 4. On this record, petitioner has not established that Hatcher's representation even encompassed petitioner's removal proceedings during the relevant time period and has therefore not established an essential predicate for a claim of ineffective assistance of counsel in those proceedings.[11]

Moreover, if it is assumed even *arguendo* that Hatcher's representation encompassed the removal proceeding, petitioner has not demonstrated ineffective assistance of counsel. Hatcher stated in his affidavit that petitioner filed with the IJ in support of her second motion to reopen that he "did not recognize" that there was a problem with petitioner's receiving her mail or that the mail was being forwarded pursuant to a Postal Service forwarding order, and that he "failed to advise" petitioner to notify the government of a change of address. A.R. 152. But Hatcher did not identify any circumstance that should have led him to "recognize" any problem with petitioner's receipt of mail from the Immigration Court; to the contrary, petitioner came to Hatcher in January 2004 to discuss the Notice to Appeal

[11] Petitioner also summarily asserts (Pet. 16-17) that the court of appeals' decision in this case "amounts to a clear violation of [petitioner's] due process rights" on the theory that she "had a clear avenue for relief from removal in that she was married to a U.S. citizen." Petitioner provides no legal authority for this assertion, nor does she assert a conflict with any other lower court. In any event, it is well-established that even a constitutional right "may be forfeited * * * by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944).

she *had* received, *ibid.* Nor did Hatcher identify any reason why he should have reiterated orally the warning explicitly set forth in the Notice to Appear that petitioner should advise the Immigration Court of any change of address. The need for petitioner to do so would have been obvious to her in any event, since petitioner represented in *her* affidavit submitted to the IJ that she had rented her post office box "specifically to receive all correspondence from the Department of Homeland Security and the Immigration Court." A.R. 82.

3. Finally, to the extent that there is any tension in the approaches currently followed by the various courts of appeals, there are two additional reasons why this case would be an unsuitable vehicle to address it. As explained earlier (pp. 5-8, *supra*), the filing at issue here is petitioner's motion to reconsider the IJ's denial of her second—and untimely—motion to reopen her removal proceedings. The relevant statute, however, clearly states that an alien may file *one* motion to reopen proceedings under this section. 8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005). In addition, as the IJ noted, although a motion to reconsider must "specify the errors of law or fact in the previous order," 8 U.S.C. 1229a(c)(6)(C) (Supp. V 2005), petitioner's motion for reconsideration "d[id] not cite any errors of fact or law in the [IJ's] prior two decisions." Pet. App. 12a. Although neither of these bases was relied upon by the BIA or the court of appeals, they provide additional reasons why the result in petitioner's case would be exceedingly unlikely to change even were this Court to hold that the 180-day deadline may be equitably tolled in certain circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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